

AMENDED IN SENATE APRIL 14, 2005

SENATE BILL

No. 165

**Introduced by Senator Speier
(Coauthor: Senator Alquist)**

(Coauthors: Assembly Members Jones, Maze, and Mullin Mullin,
Pavley, and Ruskin)

February 8, 2005

An act to amend Sections 8547.7, 8547.8, 8547.9, ~~19583.5~~ 19682, 19683.5, and 19702 of, to add Chapter 9.5 (commencing with Section 19640) to Part 2 of Division 5 of Title 2 of, and to repeal ~~Article 1 (commencing with Section 19680) of Chapter 10 of Part 2 of Division 5 of Title 2~~ Section 19683 of, the Government Code, relating to the Office of the Special Counsel.

LEGISLATIVE COUNSEL'S DIGEST

SB 165, as amended, Speier. Office of the Special Counsel.

(1) Under the California Whistleblower Protection Act, the State Personnel Board is charged with initiating a hearing or investigation of a written complaint of reprisal or retaliation against a state employee who complains of improper governmental activity, as provided.

This bill would repeal ~~these~~ *the provisions relating to the board initiating a hearing or investigation under the act* and instead, establish the Office of the Special Counsel within the State Personnel Board to protect state employees and applicants for state employment from prohibited personnel practices, as specified, to receive and investigate allegations of alleged violations of those provisions, and to initiate disciplinary proceedings. The Special Counsel would be appointed by the Governor, subject to confirmation by the Senate, for

a 6-year term and may not be removed from office during that term, except for good cause.

This bill would establish procedures for the Special Counsel with respect to investigating allegations of prohibited personnel practices, reporting the status of investigations, requesting a stay of personnel action by the board, and recommending corrective action. The bill would require the Special Counsel to submit an annual report to the Legislature and to the board on its activities.

This bill would make conforming changes to existing law.

(2) Existing law requires the State Auditor to report the nature and details of an alleged improper governmental activity to the head of the employing agency or the appropriate appointing authority.

This bill would require the State Auditor, in those instances where he or she determines that the employing agency or appropriate appointing agency has not taken sufficient steps to discipline a state employee, to refer the matter to the Office of the Special Counsel and request the Special Counsel to initiate disciplinary proceedings.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 8547.7 of the Government Code is
2 amended to read:
3 8547.7. (a) If the State Auditor determines that there is
4 reasonable cause to believe that an employee or state agency has
5 engaged in any improper governmental activity, he or she shall
6 report the nature and details of the activity to the head of the
7 employing agency, or the appropriate appointing authority. If
8 appropriate and notwithstanding Section 7550.5, the State
9 Auditor shall report this information to the Attorney General, the
10 policy committees of the Senate and Assembly having
11 jurisdiction over the subject involved, and to any other authority
12 that the State Auditor determines appropriate.
13 (b) The State Auditor does not have any enforcement power.
14 In any case in which the State Auditor submits a report of alleged
15 improper activity to the head of the employing agency or
16 appropriate appointing authority, that individual shall report to
17 the State Auditor with respect to any action taken by the
18 individual regarding the activity, the first report being transmitted

no later than 30 days after the date of the State Auditor's report and monthly thereafter until final action has been taken. In any instance where the State Auditor determines that the employing agency or appropriate appointing authority has not taken sufficient steps to discipline a state employee whom the State Auditor has determined, based on its investigative findings, has engaged in misconduct, the State Auditor shall refer the matter to the Office of the Special Counsel, and request that the Special Counsel initiate disciplinary proceedings against the employee in accordance with Section 19583.5.

(c) Every investigative audit shall be kept confidential, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the identity of the individual or individuals involved, or release any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

(d) This section shall not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

SEC. 2. Section 8547.8 of the Government Code is amended to read:

8547.8. (a) A state employee or applicant for state employment who files a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 8547.3, may also file a copy of the written complaint with the Office of the Special Counsel, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the Office of the Special Counsel, shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year. Pursuant to Article 3 (commencing with Section 19660) of Chapter 9.5 of Part 2 of Division 5 or pursuant to Section 19583.5, any state civil service

1 employee who ~~intentionally engages~~, after a hearing before the
2 State Personnel Board, as requested by the Office of Special
3 Counsel, the executive officer of the State Personnel Board, or a
4 state employee or applicant for state employment, is found to
5 have engaged in that conduct shall be disciplined by adverse
6 action as provided by Section 19572.

7 (c) In addition to all other penalties provided by law, any
8 person who intentionally engages in acts of reprisal, retaliation,
9 threats, coercion, or similar acts against a state employee or
10 applicant for state employment for having made a protected
11 disclosure shall be liable in an action for damages brought
12 against him or her by the injured party. Punitive damages may be
13 awarded by the court where the acts of the offending party are
14 proven to be malicious. Where liability has been established, the
15 injured party shall also be entitled to reasonable attorney's fees
16 as provided by law. However, any action for damages shall not
17 be available to the injured party unless the injured party has ~~first~~
18 *done both of the following*:

19 (1) *First*, filed a complaint with the Office of the Special
20 Counsel pursuant to subdivision (a), and the Office of the Special
21 Counsel has declined to initiate proceedings concerning the
22 matter pursuant to Article 3 (commencing with Section 19660) of
23 Chapter 9.5 of Part 2 of Division 5.

24 (2) *Thereafter*, files his or her complaint with the State
25 Personnel Board and the State Personnel Board has declined to
26 accept jurisdiction over the complaint.

27 (d) This section is not intended to prevent an appointing
28 power, manager, or supervisor from taking, directing others to
29 take, recommending, or approving any personnel action or from
30 taking or failing to take a personnel action with respect to any
31 state employee or applicant for state employment if the
32 appointing power, manager, or supervisor reasonably believes
33 any action or inaction is justified on the basis of evidence
34 separate and apart from the fact that the person has made a
35 protected disclosure as defined in subdivision (b) of Section
36 8547.2.

37 (e) In any civil action or administrative proceeding, once it has
38 been demonstrated by a preponderance of evidence that an
39 activity protected by this article was a contributing factor in the
40 alleged retaliation against a former, current, or prospective

employee, the burden of proof shall be on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.

SEC. 3. Section 8547.9 of the Government Code is amended to read:

8547.9. Notwithstanding Section 19572, if the Office of the Special Counsel determines that there is a reasonable basis for an alleged violation, or finds an actual violation of Section 8547.3, it shall transmit a copy of the investigative report to the State Auditor. All working papers pertaining to the investigative report shall be made available under subpoena in a civil action brought under Section 19676.

~~SEC. 4. Section 19583.5 of the Government Code is amended to read:~~

~~19583.5. Any person, except for a current ward or inmate of the California Youth Authority or the Department of Corrections, or a representative of a ward or inmate, may file charges against an employee requesting that the Office of the Special Counsel initiate adverse action for one or more causes for discipline specified in this article. Charges filed by a person who is a state employee shall not include issues covered by the state's employee grievance or other merit appeals processes. Any request of the Office of the Special Counsel to file charges pursuant to this section shall be filed within one year of the event or events that led to the filing. An employee who has sought to bring a charge or an adverse action against another employee using the grievance process, shall first exhaust that administrative process prior to bringing the case to the board. The Office of the~~

~~Special Counsel shall process any request to initiate disciplinary action that it receives in accordance with Article 3 (commencing with Section 19660) of Chapter 9.5 of Part 2 of Division 5.~~

~~SEC. 5.~~

SEC. 4. Chapter 9.5 (commencing with Section 19640) is added to Part 2 of Division 5 of Title 2 of the Government Code, to read:

CHAPTER 9.5. THE OFFICE OF THE SPECIAL COUNSEL

Article 1. General Provisions

19640. This chapter shall be known and referred to as the Special Counsel Act.

19641. As used in this chapter, unless a different meaning clearly appears from the context:

(a) "Board" means the State Personnel Board.

(b) "Office" means the Office of the Special Counsel.

Article 2. The Office of the Special Counsel

19646. (a) There is hereby established within the State Personnel Board the Office of the Special Counsel, which shall be headed by the Special Counsel.

(b) In order to be free of organizational impairments to independence, the Office of the Special Counsel shall be deemed to be within the executive branch of state government, but shall not be subject to control or direction by any officer or employee of the executive branch.

(c) The office shall be structured as a separate branch of the State Personnel Board, reporting directly to the members of the board.

(d) In order to remove any possibility of conflicts of interest, neither the Special Counsel nor his or her designee shall serve as legal counsel to the members of the board.

19647. The Office of the Special Counsel shall perform the following duties:

(a) Protect state employees and applicants for state employment from prohibited personnel practices, as set forth in Sections 8547.3 and 19702.

1 (b) Receive and investigate allegations of violations of
2 Sections 8547.3 and 19702 and, where appropriate, initiate
3 disciplinary action proceedings for such violations under Article
4 3 (commencing with Section 19660) of Chapter 9.5 of Part 2 of
5 Division 5.

6 ~~(e) Receive and investigate, pursuant to Section 19583.5,~~
7 ~~allegations of violations of Section 19572 and, where~~
8 ~~appropriate, initiate disciplinary action proceedings for such~~
9 ~~violations under Article 3 (commencing with Section 19660) of~~
10 ~~Chapter 9.5 of Part 2 of Division 5.~~

11 19648. (a) The Special Counsel shall be appointed by the
12 Governor, subject to confirmation by the Senate, to a six-year
13 term. The Special Counsel may not be removed from office
14 during that term, except for good cause.

15 (b) Consistent with subdivision (b) of Section 19646, the
16 Special Counsel shall not be subject to the direction or control by
17 any agent or employee of the State Personnel Board, or any other
18 state agency.

19 (c) The Special Counsel shall be an attorney who, by
20 demonstrated ability, background, training, or experience, is
21 especially qualified to carry out the functions of the position.

22 19649. (a) The annual salary for the Special Counsel shall be
23 equivalent to that of the salary for the career executive
24 assignment position of a Chief Counsel I as established by the
25 Department of Personnel Administration.

26 (b) The Special Counsel shall be reimbursed for all actual
27 expenses incurred or paid by him or her in the discharge of his or
28 her official duties.

29 19650. (a) The Special Counsel may appoint legal,
30 investigative, administrative, and support personnel necessary to
31 perform the functions of Office of the Special Counsel.

32 (b) Any appointment made under this section shall be made in
33 accordance with procedures established by the board.

34 (c) All employees of the Office of the Special Counsel shall be
35 designated as excluded employees, as defined in Section 3527.

36 19651. The permanent office of the Special Counsel shall be
37 in Sacramento. The board shall ensure that the Special Counsel is
38 provided with suitable and sufficient offices.

Article 3. Investigations and Corrective Action

19660. (a) The Special Counsel shall receive any allegation of a prohibited personnel action in violation of Sections 8547.3 and 19702, and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a violation has occurred, exists, or may be taken.

~~(b) Pursuant to Section 19663, the Special Counsel shall receive any allegation that a state employee has violated one or more of the provisions of Section 19572, and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a violation has occurred, exists, or may be taken.~~

~~(e)~~

(b) Within 15 days after the date of receiving an allegation of a prohibited personnel practice pursuant to subdivision (a), ~~or an allegation of a violation of Section 19572 pursuant to subdivision (b)~~, the Special Counsel shall provide written notice to the person who made the allegation of both of the following:

(1) The allegation has been received by the Special Counsel.

(2) The name of a person at the Office of the Special Counsel who shall serve as a contact with the person making the allegation.

19661. (a) Unless an investigation is terminated under Section 19662, the Special Counsel shall do all of the following:

(1) Within 90 days after notice is provided under subdivision ~~(e) of Section 19677~~ (b) of Section 19660, notify the person who made the allegation of the status of the investigation and any action taken by the office since the filing of the allegation.

(2) Notify the person who made the allegation of the status of the investigation and any action taken by the office since the last notice, at least every 60 days after notice is given under paragraph (1).

(3) Notify the person who made the allegation of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(b) (1) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice ~~or a violation of Section 19572~~, the Special Counsel shall provide a

1 written status report to the person who made the allegation of the
2 proposed findings of fact and legal conclusions.

3 (2) The person may submit written comments about the report
4 to the Special Counsel.

5 (3) The Special Counsel shall not be required to provide a
6 subsequent written status report under this subdivision after the
7 submission of the written comments provided pursuant to
8 paragraph (1).

9 19662. (a) If the Special Counsel terminates any
10 investigation, the Special Counsel shall prepare and transmit to
11 any person on whose allegation the investigation was initiated a
12 written statement notifying the person of all of the following:

13 (1) The termination of the investigation.

14 (2) A summary of relevant facts ascertained by the Special
15 Counsel, including the facts that support, and the facts that do not
16 support, the allegations made by that person.

17 (3) The reasons for terminating the investigation.

18 (4) A response to any comments submitted under subdivision
19 ~~(a)~~ (b) of Section 19661.

20 (b) A written statement under subdivision (a) may not be
21 admissible as evidence in any judicial or administrative
22 proceeding, without the consent of the person who received such
23 statement under subdivision (a).

24 19663. (a) Except in a case in which a state employee or
25 applicant for state employment has the right to appeal directly to
26 the board under any law, rule, or regulation, a state employee or
27 applicant for state employment shall ~~seek corrective action from~~
28 ~~first file his or her complaint regarding violations of Section~~
29 ~~8547.3 or 19702 with the Special Counsel before seeking~~
30 ~~corrective action from filing his or her complaint with the board.~~
31 A state employee or applicant for state employment may ~~seek~~
32 ~~corrective action from the board under Section 19670, if file his~~
33 ~~or her complaint with the board, if~~ paragraph (1) or (2) occurs:

34 (1) (A) The state employee or applicant for state employment
35 seeks corrective action for a prohibited personnel practice
36 described in Section 8547.3, ~~19702, or 19572 or 19702~~ from the
37 Special Counsel.

38 (B) The Special Counsel notifies the state employee or
39 applicant for state employment that an investigation concerning

1 that state employee or applicant for state employment has been
2 terminated.

3 (C) No more than 60 days have elapsed since notification was
4 provided to the state employee or applicant for state employment
5 that the investigation was terminated.

6 (2) More than 120 days have elapsed since the state employee
7 or applicant has sought corrective action from the Special
8 Counsel, and the state employee or applicant for state
9 employment has not been notified by the Special Counsel that the
10 Special Counsel shall seek corrective action on behalf of the state
11 employee or applicant for state employment.

12 *(b) Within 10 working days of receipt of any complaint filed*
13 *with the board pursuant to subdivision (a), the board shall notify*
14 *the complaining party that the complaint has been accepted or*
15 *rejected. If the complaint is accepted, the board shall schedule*
16 *the complaint for a hearing before an administrative law judge.*
17 *The hearing shall be conducted in accordance with the laws and*
18 *rules applicable to board hearings. If the complaint is not*
19 *accepted, the board shall notify the complaining party as to the*
20 *reasons why the complaint has not been accepted.*

21 ~~(b)~~

22 (c) In addition to any authority granted under Sections 19660
23 and 19661, the Special Counsel may, in the absence of an
24 allegation, conduct an investigation for the purpose of
25 determining whether there are reasonable grounds to believe that
26 a prohibited personnel practice or a pattern of prohibited
27 personnel practices has occurred, exists, or may be taken.

28 19664. (a) (1) The Special Counsel may request that the
29 members of the board issue, by majority vote, a stay of any
30 personnel action for 45 days if the Special Counsel determines
31 that there are reasonable grounds to believe that the personnel
32 action was taken, or may be taken, as a result of a prohibited
33 personnel practice.

34 (2) The members of the board shall order the stay unless the
35 members determine that, under the facts and circumstances
36 involved, such a stay would not be appropriate.

37 (3) Unless denied under paragraph (2), any stay under this
38 subdivision shall be granted during the first regularly scheduled
39 board meeting that occurs after the date of the request for the stay
40 by the Special Counsel.

1 (b) The board may extend the period of any stay granted under
2 subdivision (a) for any period that the board considers
3 appropriate.

4 (c) The board shall allow any appointing authority that is the
5 subject of a stay to comment to the board on any extension of
6 stay proposed under subdivision (b).

7 (d) A stay may be terminated by the board at any time, except
8 that a stay may not be terminated by the board under the
9 following circumstances:

10 (1) On its own motion or on the motion of an appointing
11 authority, unless notice and opportunity for oral or written
12 comments are first provided to the Special Counsel and the
13 individual on whose behalf the stay was ordered.

14 (2) On motion of the Special Counsel, unless notice and
15 opportunity for oral or written comments are first provided to the
16 individual on whose behalf the stay was ordered.

17 19665. (a) (1) Except as provided under paragraph (2), no
18 later than 240 days after the date of receiving an allegation of a
19 prohibited personnel practice under subdivision (a) of Section
20 19660, the Special Counsel shall make a determination whether
21 there are reasonable grounds to believe that a prohibited
22 personnel practice has occurred, exists, or may be taken.

23 (2) If the Special Counsel is unable to make the required
24 determination within the 240-day period specified under
25 paragraph (1) and the person submitting the allegation of a
26 prohibited personnel practice agrees to an extension of time, the
27 determination shall be made within the additional period of time
28 as shall be agreed upon between the Special Counsel and the
29 person submitting the allegation.

30 (b) If, in connection with any investigation, the Special
31 Counsel determines that there are reasonable grounds to believe
32 that a prohibited personnel practice has occurred, exists, or is to
33 be taken which requires corrective action, the Special Counsel
34 shall report the determination together with any findings or
35 recommendations to the appointing authority involved. The
36 Special Counsel may include in the report recommendations for
37 corrective action to be taken.

38 (c) If, after a reasonable period of time, the appointing
39 authority does not act to correct the prohibited personnel

1 practice, the Special Counsel may petition the board for
2 corrective action.

3 (d) If the Special Counsel finds, in consultation with the
4 individual subject to the prohibited personnel practice, that the
5 appointing authority has acted to correct the prohibited personnel
6 practice, the Special Counsel shall file that finding with the
7 board, together with any written comments that the individual
8 may provide.

9 (e) A determination by the Special Counsel under this section
10 shall not be cited or referred to in any proceeding under this
11 article or any other administrative or judicial proceeding for any
12 purpose, without the consent of the person submitting the
13 allegation of a prohibited personnel practice.

14 19666. (a) Whenever the Special Counsel petitions the board
15 for corrective action, the board shall provide an opportunity for
16 ~~both~~ *either* of the following:

17 (1) Oral or written comments by the Special Counsel, and the
18 appointing authority ~~involved~~.

19 ~~(2) Written~~ *involved and written* comments by any individual
20 who alleges that he or she is the subject of the prohibited
21 personnel practice.

22 (2) *A hearing before either the board, an administrative law*
23 *judge designated by the board, or both. The hearing shall be*
24 *conducted in accordance with the laws and rules applicable to*
25 *board hearings.*

26 (b) The board shall order corrective action as the board
27 considers appropriate, if the board determines that the Special
28 Counsel has demonstrated that a prohibited personnel practice
29 has occurred, exists, or may be taken.

30 19667. (a) Judicial review of any final order or decision of
31 the board under this chapter may be obtained by any employee,
32 former employee, or applicant for employment adversely
33 affected by the order or decision.

34 (b) (1) If, in connection with any investigation under this
35 chapter, the Special Counsel determines that there is reasonable
36 cause to believe that a criminal violation has occurred, the
37 Special Counsel shall report the determination to the Attorney
38 General and to the appointing authority involved.

39 (2) In any case in which the Special Counsel determines that
40 there are reasonable grounds to believe that a prohibited

1 personnel practice or a violation of Section 19572 has occurred,
2 exists, or may be taken, the Special Counsel shall proceed with
3 any investigation or proceeding unless both of the following
4 occur:

5 (A) The alleged violation has been reported to the Attorney
6 General.

7 (B) The Attorney General is pursuing an investigation, in
8 which case the Special Counsel, after consultation with the
9 Attorney General, has discretion as to whether to proceed.

10 19668. (a) If, in connection with any investigation under this
11 chapter, the Special Counsel determines that there is reasonable
12 cause to believe that any violation of any law, rule, or regulation
13 has occurred other than one referred to in subdivision (b) of
14 Section 19667, the Special Counsel shall report such violation to
15 the appointing authority involved.

16 (b) The Special Counsel shall require, within 30 days after the
17 receipt of the report by the appointing authority, a certification
18 that states both of the following:

19 (1) That the appointing authority has personally reviewed the
20 report.

21 (2) What action has been or will be taken, and when the action
22 will be completed.

23 (c) During any investigation initiated under this chapter, no
24 disciplinary action shall be taken against any employee for any
25 alleged prohibited activity under investigation or for any related
26 activity without the approval of the Special Counsel.

27 (d) If the board orders corrective action under this chapter, the
28 corrective action may include both of the following:

29 (1) That the individual be placed, as nearly as possible, in the
30 position the individual would have been in had the prohibited
31 personnel practice not occurred.

32 (2) Reimbursement for attorney's fees, back pay and related
33 benefits, medical costs incurred, travel expenses, and any other
34 reasonable and foreseeable consequential damages.

35 36 Article 4. Disciplinary Action 37

38 19670. (a) Except as provided in subdivision (f), if the
39 Special Counsel determines that disciplinary action should be
40 taken against any employee for having committed a prohibited

1 personnel practice in violation of Section 8547.3 or 19702, ~~or for~~
2 ~~having violated Section 19572~~, the Special Counsel shall prepare
3 a written complaint against the employee containing the Special
4 Counsel's determination, together with a statement of supporting
5 facts, and present the complaint and statement to the employee
6 and the board.

7 (b) Any complaint filed against an employee pursuant to
8 subdivision (a), shall include the following information:

- 9 (1) The reasons for the action.
10 (2) A copy of the charges.
11 (3) A copy of all materials on which the action is based.
12 (4) Notice of the employee's right to be represented in
13 proceedings under this article.

14 (c) Any employee against whom a complaint has been
15 presented to the board under subdivision (a) is entitled to all of
16 the following:

17 (1) File an answer to the complaint in writing to the board
18 within 30 days from the date of service of the notice of
19 complaint, and to furnish affidavits and other documentary
20 evidence in support of the answer.

21 (2) Be represented by an attorney or other representative.

22 (3) A hearing before the board or an administrative law judge
23 designated by the board. The hearing shall be conducted in
24 accordance with the laws and rules applicable to a board hearing
25 concerning appeals from notices of adverse action, including all
26 applicable discovery provisions.

27 (d) Whenever the board finds that the complained of conduct
28 constitutes legal cause for discipline under one or more
29 subdivisions of Section 19572, it shall impose a just and proper
30 penalty and cause an entry to that effect to be made in the
31 employee's official personnel records.

32 (e) Judicial review of any final order or decision of the board
33 under this section may be obtained by any employee adversely
34 affected by such order or decision.

35 (f) In the case of a state employee deemed to be exempt from
36 the state civil service pursuant to Section 4 of Article VII of the
37 California Constitution, the complaint and statement referred to
38 in subdivision (a) of Section 19670, together with any response
39 of the employee, shall be presented to the Governor, or other
40 entity deemed appropriate by the Special Counsel, for

1 appropriate action in lieu of being presented under subdivisions
2 (a) to (e), inclusive.

3
4 Article 5. Authority of the Special Counsel
5

6 19676. (a) In connection with any investigation conducted by
7 the office, the Special Counsel or his or her designee, may do any
8 of the following:

9 (1) Administer oaths.

10 (2) Certify to all official acts.

11 (3) Issue subpoenas for the attendance of witnesses and the
12 production of papers, books, accounts, or documents, or for the
13 making of oral or written statements, in any interview conducted
14 as part of an investigation.

15 (b) Any subpoena issued under this section extends as process
16 to all parts of the state and may be served by any person
17 authorized to serve process of courts of record or by any person
18 designated for that purpose by the Special Counsel or his or her
19 designee. The person serving this process may receive
20 compensation as allowed by the Special Counsel or his or her
21 designee, not to exceed the fees prescribed by law for similar
22 service.

23 19677. (a) The superior court in the county in which any
24 interview is held under the direction of the Special Counsel or his
25 or her designee has jurisdiction to compel the attendance of
26 witnesses, the making of oral or written sworn statements, and
27 the production of papers, books, accounts, and documents, as
28 required by any subpoena issued by the special counsel or his or
29 her designee.

30 (b) If any witness refuses to attend or testify or produce any
31 papers required by the subpoena, the Special Counsel or his or
32 her designee may petition the superior court in the county in
33 which the hearing is pending for an order compelling the person
34 to attend and answer questions under penalty of perjury or
35 produce the papers required by the subpoena before the person
36 named in the subpoena. The petition shall set forth all of the
37 following:

38 (1) That due notice of the time and place of attendance of the
39 person or production of the papers has been given.

1 (2) That the person has been subpoenaed in the manner
2 prescribed in Section 19676.

3 (3) That the person has failed and refused to attend or produce
4 the papers required by subpoena before the Special Counsel or
5 his or her designee as named in the subpoena, or has refused to
6 answer questions propounded to him or her in the course of the
7 interview under penalty of perjury.

8 (c) Upon the filing of the petition, the court shall enter an
9 order directing the person to appear before the court at a
10 specified time and place and then show cause why he or she has
11 not attended, answered questions under penalty of perjury, or
12 produced the papers as required. A copy of the order shall be
13 served upon him or her. If it appears to the court that the
14 subpoena was regularly issued by the Special Counsel or his or
15 her designee, the court shall enter an order that the person appear
16 before the person named in the subpoena at the time and place
17 fixed in the order and answer questions under penalty of perjury
18 or produce the required papers. Upon failure to obey the order,
19 the person shall be dealt with as for contempt of court.

20 21 Article 6. Reporting Requirements 22

23 19680. Notwithstanding Section 7550.5, the Special Counsel
24 shall submit an annual report to the Legislature and to the
25 members of the State Personnel Board on the activities of the
26 office. The report shall include the number, types, and
27 disposition of allegations of prohibited personnel practices filed
28 with it, investigations conducted by it, cases in which it did not
29 make a determination whether there are reasonable grounds to
30 believe that a prohibited personnel practice has occurred, exists,
31 or may be taken within the 240-day period specified in paragraph
32 (1) of subdivision (a) of Section 19665, and actions initiated by it
33 before the board.

34 ~~SEC. 6. Article 1 (commencing with Section 19680) of~~
35 ~~Chapter 10 of Part 2 of Division 5 of Title 2 of the Government~~
36 ~~Code is repealed.~~

37 *SEC. 5. Section 19682 of the Government Code is amended to*
38 *read:*

39 19682. Every person who violates any provision of this
40 chapter is guilty of a misdemeanor. ~~In accordance with Section~~

~~19683, action~~ *Action* may be taken by the appointing power, or the executive officer of the board may file charges, against a state employee who violates any provisions of this chapter.

SEC. 6. Section 19683 of the Government Code is repealed.

~~19683. (a) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply.~~

~~(b) If the executive officer finds that the supervisor, manager, employee, or appointing power retaliated against the complainant for engaging in protected whistleblower activities, the supervisor, manager, employee, or appointing power may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's normal rules governing appeals, hearings, investigations, and disciplinary proceedings.~~

~~(c) If, after the hearing, the State Personnel Board determines that a violation of Section 8547.3 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct prohibited by Section 8547.3.~~

~~(d) Whenever the board determines that a manager, supervisor, or employee, who is named a party to the retaliation complaint, has violated Section 8547.3 and that violation constitutes legal~~

1 cause for discipline under one or more subdivisions of Section
2 19572, it shall impose a just and proper penalty and cause an
3 entry to that effect to be made in the manager's, supervisor's, or
4 employee's official personnel records.

5 (e) ~~Whenever the board determines that a manager, supervisor,~~
6 ~~or employee, who is not named a party to the retaliation~~
7 ~~complaint, may have engaged in or participated in any act~~
8 ~~prohibited by Section 8547.3, the board shall notify the~~
9 ~~manager's, supervisor's, or employee's appointing power of that~~
10 ~~fact in writing. Within 60 days after receiving the notification,~~
11 ~~the appointing power shall either serve a notice of adverse action~~
12 ~~on the manager, supervisor, or employee, or set forth in writing~~
13 ~~its reasons for not taking adverse action against the manager,~~
14 ~~supervisor, or employee. The appointing power shall file a copy~~
15 ~~of the notice of adverse action with the board in accordance with~~
16 ~~Section 19574. If the appointing power declines to take adverse~~
17 ~~action against the manager, supervisor, or employee, it shall~~
18 ~~submit its written reasons for not doing so to the board, which~~
19 ~~may take adverse action against the manager, supervisor, or~~
20 ~~employee as provided in Section 19583.5. A manager,~~
21 ~~supervisor, or employee who is served with a notice of adverse~~
22 ~~action pursuant to this section may file an appeal with the board~~
23 ~~in accordance with Section 19575.~~

24 (f) ~~In order for the Governor and the Legislature to determine~~
25 ~~the need to continue or modify state personnel procedures as they~~
26 ~~relate to the investigations of reprisals or retaliation for the~~
27 ~~disclosure of information by public employees, the State~~
28 ~~Personnel Board, by June 30 of each year, shall submit a report~~
29 ~~to the Governor and the Legislature regarding complaints filed,~~
30 ~~hearings held, and legal actions taken pursuant to this section.~~

31 *SEC. 7. Section 19683.5 of the Government Code is amended*
32 *to read:*

33 19683.5. If a state employee is successful in an action
34 brought pursuant to Section ~~19683~~ 8547.8, the complaining
35 employee shall be reimbursed for all costs incurred pursuant to
36 Section 995.3.

37 ~~SEC. 7.~~

38 *SEC. 8. Section 19702 of the Government Code is amended*
39 *to read:*

1 19702. (a) A person shall not be discriminated against under
2 this part on any basis listed in subdivision (a) of Section 12940,
3 as those bases are defined in Sections 12926 and 12926.1, except
4 as otherwise provided in Section 12940. A person shall not be
5 retaliated against because he or she has opposed any practice
6 made an unlawful employment practice, or made a charge,
7 testified, assisted, or participated in any manner in an
8 investigation, proceeding, or hearing under this part. This
9 subdivision is declaratory of existing law.

10 (b) For purposes of this article, “discrimination” includes
11 harassment.

12 (c) If the board finds that a person has engaged in
13 discrimination under this part, and it appears that this practice
14 consisted of acts described in Section 243.4, 261, 262, 286, 288,
15 288a, or 289 of the Penal Code, the board, with the consent of the
16 complainant, shall provide the local district attorney’s office with
17 a copy of the board’s decision and order.

18 (d) (1) Except as otherwise provided in paragraph (2), if the
19 board finds that discrimination has occurred in violation of this
20 part, the board shall issue and cause to be served on the
21 appointing authority an order requiring the appointing authority
22 to cause the discrimination to cease and desist and to take any
23 action, including, but not limited to, hiring, reinstatement, or
24 upgrading of employees, with or without backpay, and
25 compensatory damages, which, in the judgment of the board, will
26 effectuate the purposes of this part. Consistent with this
27 authority, the board may establish rules governing the award of
28 compensatory damages. The order shall include a requirement of
29 reporting the manner of compliance.

30 (2) Notwithstanding paragraph (1), this paragraph applies to
31 state employees in State Bargaining Unit 6 or 8. If the board
32 finds that discrimination has occurred in violation of this part, the
33 board shall issue and cause to be served on the appointing
34 authority an order requiring the appointing authority to cause the
35 discrimination to cease and desist and to take any action,
36 including, but not limited to, hiring, reinstatement, or upgrading
37 of employees, with or without backpay, adding additional
38 seniority, and compensatory damages, which, in the judgment of
39 the board, will effectuate the purposes of this part. Consistent
40 with this authority, the board may establish rules governing the

1 award of compensatory damages. The order shall include a
2 requirement of reporting the manner of compliance.

3 (e) Any person claiming discrimination within the state civil
4 service may submit a written complaint that states the particulars
5 of the alleged discrimination, the name of the appointing
6 authority, the persons alleged to have committed the unlawful
7 discrimination, and any other information that the board may
8 require. The complaint shall be filed with the appointing
9 authority or, in accordance with Article 3 (commencing with
10 Section 19660) of Chapter 9.5 of Part 2 of Division 5, with the
11 Office of the Special Counsel, except for complaints that are filed
12 pursuant to paragraph (1) of subdivision (h).

13 (f) (1) Complaints shall be filed within one year of the alleged
14 unlawful discrimination or the refusal to act in accordance with
15 this section, except that this period may be extended for not
16 greater than 90 days following the expiration of that year, if a
17 person allegedly aggrieved by unlawful discrimination first
18 obtained knowledge of the facts of the alleged unlawful
19 discrimination after the expiration of one year from the date of its
20 occurrence. Complaints of discrimination in adverse actions or
21 rejections on probation shall be filed in accordance with Sections
22 19175 and 19575.

23 (2) Notwithstanding paragraph (1), this paragraph shall apply
24 only to state employees in State Bargaining Unit 8. Complaints
25 shall be filed within one year of the alleged unlawful
26 discrimination or the refusal to act in accordance with this
27 section, except that this period may be extended for not greater
28 than 90 days following the expiration of that year, if a person
29 allegedly aggrieved by unlawful discrimination first obtained
30 knowledge of the facts of the alleged unlawful discrimination
31 after the expiration of one year from the date of its occurrence.
32 Complaints of discrimination in disciplinary actions defined in
33 Section 19576.5 shall be filed in accordance with that section.
34 Complaints of discrimination in all other disciplinary actions
35 shall be filed in accordance with Section 19575. Complaints of
36 discrimination in rejections on probation shall be filed in
37 accordance with Section 19175.3.

38 (g) If an employee of the appointing authority refuses, or
39 threatens to refuse, to cooperate in the investigation of a
40 complaint of discrimination, the appointing authority may seek

1 assistance from the Office of the Special Counsel. The Office of
2 the Special Counsel may provide for direct investigation or
3 prosecution of the complaint, the use of subpoenas, or any other
4 action that will effectuate the purposes of this section.

5 (h) If a person demonstrates by a preponderance of evidence
6 that the person's opposition to any practice made an unlawful
7 employment practice under this part, or the person's charging,
8 testifying, assisting, or participation in any manner in an
9 investigation, proceeding, or hearing under this part, was a
10 contributing factor in any adverse employment action taken
11 against him or her, the burden of proof shall be on the supervisor,
12 manager, employee, or appointing power to demonstrate by clear
13 and convincing evidence that the alleged adverse employment
14 action would have occurred for legitimate, independent reasons
15 even if the person had not engaged in activities protected under
16 this part. If the supervisor, manager, employee, or appointing
17 power fails to meet this burden of proof in any administrative
18 review, challenge, or adjudication in which retaliation has been
19 demonstrated to be a contributing factor, the person shall have a
20 complete affirmative defense to the adverse employment action.

21 (i) As used in this part, "adverse employment action" includes
22 promising to confer, or conferring, any benefit, effecting, or
23 threatening to effect, any reprisal, or taking, or directing others to
24 take, or recommending, processing, or approving, any personnel
25 action, including, but not limited to, appointment, promotion,
26 transfer, assignment, performance evaluation, suspension, or
27 other disciplinary action.